

DO NOT FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Local Exchange Carriers' Rates)
Terms, and Conditions for)
Expanded Interconnection for)
Special Access)

CC Docket No. 93-162

RECEIVED

JUN 30 1994

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

PETITION FOR CLARIFICATION

To: Chief, Common Carrier Bureau

Bell Atlantic¹ respectfully asks the Common Carrier Bureau ("Bureau") to clarify that it was not intending to change long-standing Commission policy regarding individual case basis ("ICB") service offerings despite the language in paragraph 17 and footnote 35 of its recent Order.² The language in that Order erroneously states that ICB arrangements are common carrier offerings and that, "[o]nce sufficient knowledge is gained about the costs of the service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers."³ The Bureau also asserts that ICB rates are

¹ The Bell Atlantic Telephone Companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

² *Supplemental Designation Order and Order to Show Cause*, DA 94-556 (May 31, 1994).

³ *Id.* at ¶ 17.

No. of Copies rec'd
List ABCDE

0-10

"generally available" if tariffs with those rates are filed.⁴ These are misstatements of Commission policy, as recently confirmed by the U.S. Court of Appeals.⁵

In the Dark Fiber case, the Commission had treated a series of ICB dark fiber offerings as common carrier services and required that they be generally tariffed.⁶ It then denied Section 214 applications to discontinue the dark fiber services.⁷ The court found that such action contradicted the Commission's long-standing policy not to consider ICB offerings as common carriage. As support for that finding, the court cited language from the Local Exchange Carrier ("LEC") Price Cap Order stating unequivocally that,

ICB offerings are those offered on a contract-type basis. While ICB offerings appear in LEC tariffs, they are not tariffed as generally-available common carrier services. In some cases, ICB services feature new technology for which little demand exists. As demand for the service grows, the ICB offering can evolve into a generally-available offering, as has been the case with large, digital, fiber optic transmission facilities. In other applications, ICB offerings are simply unique service arrangements to meet the needs of

⁴ *Id.* at n.35.

⁵ ***Southwestern Bell Telephone Company v. FCC***, Nos. 91-1416 ***et al.*** (D.C. Cir. April 5, 1994) ("Dark Fiber Decision").

⁶ ***Local Exchange Carriers' Individual Case Basis DS3 Service Offerings***, 5 FCC Rcd 4842 (1990).

⁷ ***Southwestern Bell Telephone Company***, 8 FCC Rcd 2589 (1993).

*specific customers that will never evolve into generally-available offerings.*⁸

The court further found that this statement confirmed a long-standing Commission policy. It cited a 1984 Notice in which the Commission proposed to modify its traditional approach to ICBs.⁹ There, the Commission stated that its existing policy was that ICBs (then called special construction lines) "are different from, and do not include, services made generally available by the carrier"¹⁰ and distinguished them from common carrier offerings.¹¹ After receiving comments, the Commission closed the docket without changing its policy.¹² Accordingly, its existing policy, articulated in both the 1984 rulemaking notice and the more recent price cap order -- that ICB arrangements are not generally-available, common carrier services -- remains in effect.

The Bureau's language in the Order is flatly inconsistent with this long-standing Commission policy. Without notice and comment, the Bureau may not, consistent with the Administrative Procedure Act, cavalierly reverse a clear

⁸ Dark Fiber Decision, slip op. at 18 (citing ***Policy and Rules Concerning Rates for Dominant Carriers***, 5 FCC Rcd 6786 at ¶ 193 (1990)) (emphasis by the court).

⁹ ***Special Construction of Lines and Special Service Arrangements Provided by Common Carriers, Notice of Proposed Rulemaking***, 97 F.C.C.2d 978 (1984).

¹⁰ *Id.* at 991.

¹¹ *Id.* at 989-90.

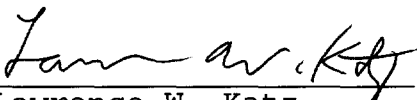
¹² ***Order***, 5 FCC Rcd 5410 (1990).

Commission policy. Accordingly, the Bureau should vacate that language and clarify that its Order should not be interpreted to affect existing Commission policy regarding ICBs.¹³

Respectfully submitted,

**The Bell Atlantic Telephone
Companies**

By Their Attorney


Lawrence W. Katz

Edward D. Young, III
Of Counsel

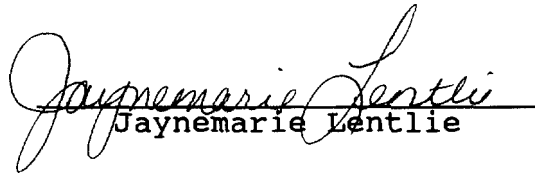
1710 H Street, N.W.
Washington, D.C. 20006
(202) 392-6580

June 30, 1994

¹³ The language in question is **dictum** and, therefore, vacating it would have no effect on the substantive issues relating to the collocation tariffs addressed therein.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petition for Clarification" was served this 30th day of June, 1994, by first class mail, postage prepaid, on the parties on the attached list.


Jaynemie Lentlie

A. Richard Metzger *
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, DC 20554

Chief, Tariff Division *
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, DC 20554
(two copies)

ITS, Inc. *
1919 M Street, N.W., Room 246
Washington, DC 20554

Paul R. Schwedler
Assistant Chief Regulatory Counsel
Defense Information Systems Agency
701 S. Courthouse Road
Arlington, VA 22204

Francine J. Berry
Robert J. McKee
Peter H. Jacoby
AT&T
295 North Maple Avenue
Room 3244J1
Basking Ridge, N.J. 07920

Joseph W. Miller
WilTel
Suite 3600
P.O. Box 2400
One Williams Center
Tulsa, Oklahoma 74102

Michael F. Hydock
Federal Regulatory Affairs
MCI Communication Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Michael L. Glaser
Joseph P. Benkert
Hooper & Kanouff
Counsel for Teleport Denver
1810 Wynkoop Street
Suite 200
Denver, CO 80202-1196

Randall B. Lowe
John E. Hoover
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088

Leon M. Kestenbaum
Marybeth M. Banks
Sprint Communications Co.
1850 M Street, N.W.
Suite 1110
Washington, D.C. 20036

James S. Blaszak
Francis E. Fletcher, Jr.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East Tower
Washington, D.C. 20005

Andrew D. Lipman
Eugene A. DeJordy
Swidler & Berlin
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Robert C. Atkinson
Senior Vice President
Regulatory & External Affairs
Teleport Communications Group
1 Teleport Drive, Suite 301
Staten Island, N.Y. 10311

Heather Burnett Gold
President
Association for Local Telecom-
munications Services
1200 19th Street, N.W.
Suite 607
Washington, D.C. 20036

James B. Gainer
Ann Henkener
Assistant Attorney General
Ohio Public Utilities Commission
180 East Broad Street
Columbus, Ohio 43266-0573

Floyd S. Keene
Brian R. Gilomen
Ameritech Services
2000 W. Ameritech Center Drive
Room 4H64
Hoffman Estates, IL 60196-1025

William B. Barfield
Richard M. Sbaratta
BellSouth Telecommunications
4300 Southern Bell Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375

Thomas E. Taylor
David W. Hills
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Gail L. Polivy
GTE Service Corp.
1850 M Street, N.W.
Suite 1200
Washington, DC 20036

Ward W. Wueste, Jr.
Richard McKenna
GTE Service Corp.
P. O. Box 152092
Irving, Tx 75015-2092

James P. Tuthill
Jeffrey B. Thomas
Pacific Telesis
140 New Montgomery St.
Rm. 1522A
San Francisco, Ca. 94105

Stanley J. Moore
Pacific Telesis
1275 Pennsylvania Ave., N.W.
4th Floor
Washington, DC 20004

Patrick A. Lee
Edward E. Niehoff
NYNEX
120 Bloomingdale Road
White Plains, NY 10605

Josephine S. Trubek
Michael J. Shortley, III
Rochester Telephone
Rochester Tel Center
180 South Clinton Avenue
Rochester, NY 14646-0700

Rochelle D. Jones
Southern New England Telephone
Division Staff Manager -
Regulatory Matters
227 Church Street
New Haven, CT 06506

Durward D. Dupre
Richard C. Hartgrove
Michael J. Zpevak
Southwestern Bell Telephone
1010 Pine Street Room 2114
St. Louis, MO 63101

W. Richard Morris
United Telecommunications, Inc.
P. O. Box 11315
Kansas City, MO 64112

Jay C. Keithley
United Telecommunications, Inc.
1850 M Street, NW
Suite 1100
Washington, DC 20036

Lawrence E. Sarjeant
Kathryn Marie Krause
US West Communications
1020 19th Street, N.W.
Suite 700
Washington, DC 20036

James Ogg
Centel Corp.
30 S. Wacker Drive
Chicago, IL 60606-6604

Robert Mazer
Nixon, Hardgrave, Devans & Doyle
One Thomas Circle, Suite 800
Washington, DC 20005

Cindy Z. Schonhaut
MFS Communications Co., Inc.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

F. Thomas Tuttle
Douglas J. Minster
Pierson & Tuttle
1200 19th Street, N.W.
Suite 607
Washington, D.C. 20036

* BY HAND